BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

BOBBI J. MAINE	)	
Claimant	)	
	)	
VS.	)	
	)	
SPEARS MANUFACTURING COMPANY	)	
Respondent	)	Docket Nos. 1,044,809
	)	and 1,044,810
AND	)	
	)	
ZURICH AMERICAN INS. CO.	)	
Insurance Carrier	)	

ORDER

STATEMENT OF THE CASE

Respondent and its insurance carrier (respondent) requested review of the June 22, 2009, preliminary hearing Orders entered by Administrative Law Judge Thomas Klein. Kala Spigarelli, of Pittsburg, Kansas, appeared for claimant. Kendall R. Cunningham, of Wichita, Kansas, appeared for respondent. The Administrative Law Judge (ALJ) consolidated Docket Nos. 1,044,809 and 1,044,810 for hearing.[1]

In Docket No. 1,044,809, the ALJ found that respondent had notice of claimant's left carpal tunnel syndrome and left shoulder injury, which the ALJ determined occurred both from a series of repetitive traumas and a specific incident on September 11, 2008.[2] The ALJ ordered respondent to provide a list of three physicians from which claimant is to choose an authorized treating physician to treat her injuries to her left upper extremity.

In Docket No. 1,044,810, the ALJ found that claimant suffered work-related injuries to her right upper extremity and that respondent had notice of those injuries. The ALJ,

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[1] P.H. Trans. at 4.

[2] A review of the record would indicate that claimant's accident of September 11, 2008, injured her right shoulder and neck, not her left upper extremity. See. P.H. Trans. at 5-6, 18.

however, found that claimant was not seeking additional treatment for her right carpal tunnel syndrome as she had voluntarily been treated by Dr. Karl (Tracy) Painter.[3]

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the May 27, 2009, Preliminary Hearing and the exhibits, together with the pleadings contained in the administrative file.

ISSUES

In Docket No. 1,044,809, respondent contends that there is no evidence in the record to show that claimant suffered a compensable injury to her left upper extremity that requires medical attention. Respondent contends that claimant's injury to her left hand and wrist in December 2008 was a temporary aggravation of a preexisting condition, and respondent provided her with appropriate treatment for that aggravation. Respondent further asserts that claimant's work activities are not such as would be considered repetitive so as to give rise to a series of accidents causing carpal tunnel syndrome. Accordingly, respondent requests that the Board reverse the Order of the ALJ and deny claimant's request for medical benefits.

In Docket No. 1,044,810, respondent argues that claimant did not suffer a repetitive-use injury arising out of and in the course of her employment. Respondent further contends that claimant failed to provide it with timely notice of a repetitive injury. Also, as in Docket No. 1,044,809, respondent asserts that claimant's work activities are not such as would be considered repetitive so as to give rise to a series of accidents causing carpal tunnel syndrome. In regard to the alleged injuries relating to claimant's fall in September 2008, respondent argues that claimant did not seek out any medical treatment but, instead, returned to her normal work activities.

Claimant contends that she sustained a series of accidents until her last day worked caused by her repetitive work activities which resulted in injuries to her bilateral upper extremities. Further, she claims an injury to her right shoulder and neck that occurred in August 2008.[4] Claimant asserts that respondent had proper notice of all her injuries. Accordingly, claimant requests the Board affirm the Orders of the ALJ.

Although the ALJ found claimant's right upper extremity injuries to be compensable, he did not award claimant compensation for those injuries and he did not order respondent

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[3] The ALJ did not authorize treatment for claimant's right shoulder and neck condition.

[4] A Supervisor's Work Injury Report prepared by respondent shows that claimant sustained an accident on September 11, 2008, in which she suffered injuries to her shoulders and neck. P.H. Trans., Cl. Ex. 2. Further, claimant testified her injuries in that accident were to her right shoulders and neck. P.H. Trans. at 18.

to reimburse any medical treatment expenses or to pay for or provide medical treatment. Because the ALJ made no such orders, there are no issues that are ripe for review with regard to claimant's right upper extremity or neck injuries.

The issues for the Board's review are:

(1) Did claimant sustain injuries to her left upper extremity from an accident and/or a series of accidents that arose out of and in the course of her employment with respondent?

(2) Did claimant give respondent timely notice of accident or accidents?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Claimant began working for respondent, a company that manufactures plastic PVC pipe, on March 27, 2008, in the kitting department. Her job required her to use a handheld scanner, load boxes onto pallets and tie string around the boxes. The boxes weighed from a few ounces to 56 pounds.

Claimant first began noticing problems in April 2008 when her left wrist started swelling and causing her pain. Although she does not remember if an accident report was filed, she testified that her supervisor, Zachery Good, and her lead worker, Jay Clymer, were aware of her problems. On April 21, 2008, on her own, she sought treatment from Janice Shippy, a nurse practitioner. She eventually was seen by Dr. Carl (Tracy) Painter, an orthopedic surgeon, who diagnosed her with left de Quervain stenosing tenosynovitis. She was given a splint to wear on her left wrist at work and was given an injection. However, the injection provided her with no relief, and Dr. Painter performed a left first extensor compartment release on May 22, 2008. Claimant did not ask respondent to provide her with treatment for this condition, and her treatment and surgery were paid for out of her personal health insurance. She testified she does not know whether her left de Quervain condition was caused by her work activities.[5]

Claimant testified that a few months after starting to work at respondent, she began to have problems in her right hand. She testified that she told both Mr. Good and Mr. Clymer she was having numbness in her right hand that went up into the elbow and that she was having difficulty lifting boxes. She did not ask for medical treatment. On June 25, 2008, while being followed up by Dr. Painter after the surgery on her left hand, claimant complained to him about the numbness in the fingers of her right hand. Dr. Painter diagnosed her with right carpal tunnel syndrome. This diagnosis was confirmed by EMG and nerve conduction testing. Claimant testified that Dr. Painter told her the condition was caused by her repetitive work activities.

[5] P.H. Trans. at 34.

Claimant testified that after her diagnosis of right carpal tunnel syndrome, she spoke with Mr. Good and Mr. Clymer, telling them of her condition and that she would need to have surgery. She also testified that she told them it was Dr. Painter's opinion that the condition was caused by her work activities. She admits she did not ask to have an accident report filled out, saying she was afraid of losing her job.

In July 2008, claimant injured her left thumb at work when she felt something pop while trying to pick up something. Mr. Clymer testified that claimant told him her wrist hurt when she pulled a part down. He said he took her off that job for a day or two, but did not fill out an accident report.

On September 11, 2008, claimant tripped over a pallet at work and fell, injuring her right shoulder and neck. An accident report was filled out by respondent. Claimant did not go to a doctor at that time. However, on April 21, 2009, claimant was seen by her personal physician, Dr. F. W. Fesler, and was given an injection in her right shoulder after she complained of right shoulder and neck pain.

On December 11, 2008, claimant suffered another injury at work when she felt a tearing feeling on the inside of her left wrist while lifting a box. Claimant reported the injury to respondent and was sent to the company doctor, where she was given a splint and was put on light duty. She said she was seen by the company doctor five or six times and was given a cortisone shot in her left hand. Claimant testified that Mr. Good told her she could have a second opinion. Claimant had an appointment with Dr. Painter on December 19, 2008, concerning her right carpal tunnel syndrome. While she was at that appointment, claimant told Dr. Painter about the symptoms in her left upper extremity, saying they were similar to the symptoms she was having on the right. Dr. Painter scheduled her for EMG and nerve conduction tests on her left.

Claimant had right carpal tunnel release surgery on December 29, 2008. She testified that the surgery corrected the symptoms she was having in her right wrist and elbow. However, she is still having problems with her right shoulder and neck as a result of the fall in September 2008.

On January 6, 2009, claimant had the EMG and nerve conduction testing that had been ordered by Dr. Painter. The testing revealed that she had left carpal tunnel syndrome.

On January 12, 2009, claimant was seen by Dr. Scott Cochran at the request of respondent to treat her for the injury to her left wrist suffered on December 11, 2008. Dr. Cochran said that claimant had left carpal tunnel syndrome, but he did not believe the condition was caused by her injury in December 2008. However, he noted that the December 2008 injury may have exacerbated her symptoms.

In a letter written by Dr. Painter on March 11, 2009, he noted that claimant had findings consistent with left carpal tunnel syndrome and that she had previously been treated for left de Quervain's stenosing tenosynovitis. He stated:

> All of these issues are associated with repetitive overuse activities. [Claimant's] work related activities during the period of time of treatment also have been repetitive activities with repetitive lifting, as well as tying boxes into bundles. She does not have endocrine abnormalities leading to high risk for nerve compression syndromes. It is my medical opinion that her repetitive activities while employed at [respondent] have resulted in her left carpal tunnel syndrome, specifically as documented by EMG and nerve studies. Her history of injuries that are typically associated with repetitive overuse tends to strengthen this opinion also.[6]

Mr. Good testified that he was aware that claimant had been off work in May 2008 for surgery on her left hand, and claimant told him what type of surgery was being done. He testified that claimant did not relate that surgery to her work. He said that sometime later claimant told him she had been diagnosed with carpal tunnel syndrome, but again she did not relate the condition to her work. He said that at no time from March 2008 until December 2008, when claimant left work, did she tell him that the problems she was having with her arms were because of her work activities at respondent, and he did not ask her if they were related. Mr. Good testified that in his opinion, claimant's activities at work were not repetitive so as to cause carpal tunnel syndrome.

Mr. Clymer testified that he was aware that claimant was having problems with her left hand because she wore a brace at work. He said that claimant told him she had been diagnosed with carpal tunnel but did not tell him it was related to her work. He said that when claimant returned to work after the surgery in May 2008, she complained that her wrists and arms hurt. In July 2008, he noticed that she started wearing a brace on her right hand. Although Mr. Clymer said claimant did not tell him her condition was work related, he said, "[Claimant] just said it hurts me at work, I can't do this, I can't do that, because every time I do this, it hurts."[7] Mr. Clymer said he told Mr. Good that claimant complained numerous times about her wrists hurting at work.

Jason Moore, respondent's human resource manager, testified that respondent had only two accident reports on claimant, one on September 11, 2008, and the other on December 11, 2008. He was aware that claimant was off work in May 2008 having surgery on her hand, and he was aware that claimant was having surgery on her wrist in December 2008. Mr. Moore said he questioned Mr. Good as to whether any of claimant's conditions were work related, but Mr. Good was of the opinion that they were for preexisting conditions. Mr. Moore did not personally ask claimant about whether her conditions were work related.

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[6] P.H. Trans., Resp. Ex. 5 at 1.

[7] P.H. Trans. at 96.

K.S.A. 2008 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends."

K.S.A. 2008 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[8] Moreover, this review of a preliminary hearing order has been determined by only one Board Member, as permitted by K.S.A. 2008 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board as it is when the appeal is from a final order.[9]

An employer is liable to pay compensation to an employee where the employee incurs personal injury by accident arising out of and in the course of employment.[10] Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case.[11]

The two phrases arising "out of" and "in the course of" employment, as used in the Kansas Workers Compensation Act, have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable.

> The phrase "out of" employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Thus, an injury arises "out of" employment if it arises out of the nature, conditions, obligations, and incidents of the employment. The phrase "in the course of" employment relates to the time, place, and circumstances under which the accident occurred and means the injury happened while the worker was at work in the employer's service.[12]

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[8] K.S.A. 44-534a; see *Butera v. Fluor Daniel Constr. Corp.*, 28 Kan. App. 2d 542, 18 P.3d 278, *rev. denied* 271 Kan. 1035 (2001).

[9] K.S.A. 2008 Supp. 44-555c(k).

[10] K.S.A. 2008 Supp. 44-501(a).

[11] *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 278, 899 P.2d 1058 (1995).

[12] *Id.* at 278.

An accidental injury is compensable under the Workers Compensation Act even where the accident only serves to aggravate a preexisting condition.[13] The test is not whether the accident causes the condition, but whether the accident aggravates or accelerates the condition.[14] An injury is not compensable, however, where the worsening or new injury would have occurred even absent the accidental injury or where the injury is shown to have been produced by an independent intervening cause.[15]

Based on the record presented to date, this Board Member finds claimant suffered repetitive work-related injuries to her left wrist, arm and shoulder. Dr. Painter relates claimant's injuries to repetitive overuse activities at her job. The claimant's testimony is credible that her job duties required repetitive use of her hands, arms and shoulders to grasp, push and pull items, lift boxes and tie string. The video is consistent with claimant's testimony.

K.S.A. 44-520 states:

> Except as otherwise provided in this section, proceedings for compensation under the workers compensation act shall not be maintainable unless notice of the accident, stating the time and place and particulars thereof, and the name and address of the person injured, is given to the employer within 10 days after the date of the accident, except that actual knowledge of the accident by the employer or the employer's duly authorized agent shall render the giving of such notice unnecessary. The ten-day notice provided in this section shall not bar any proceeding for compensation under the workers compensation act if the claimant shows that a failure to notify under this section was due to just cause, except that in no event shall such a proceeding for compensation be maintained unless the notice required by this section is given to the employer within 75 days after the date of the accident unless (a) actual knowledge of the accident by the employer or the employer's duly authorized agent renders the giving of such notice unnecessary as provided in this section, (b) the employer was unavailable to receive such notice as provided in this section, or (c) the employee was physically unable to give such notice.

The Kansas Supreme Court has stated that the purpose of K.S.A. 44-520 is to afford the employer an opportunity to investigate the accident and to furnish prompt medical treatment.[16]

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[13] *Odell v. Unified School District*, 206 Kan. 752, 758, 481 P.2d 974 (1971).

[14] *Woodward v. Beech Aircraft Corp.*, 24 Kan. App. 2d 510, Syl. ¶ 2, 949 P.2d 1149 (1997).

[15] *Nance v. Harvey County*, 263 Kan. 542, 547-50, 952 P.2d 411 (1997).

[16] *Injured Workers of Kansas v. Franklin*, 262 Kan. 840, 848-49, 942 P.2d 591 (1997); *Pike v. Gas Service Co.*, 223 Kan. 408, 409, 573 P.2d 1055 (1978); *Ries v. Manpower, Inc. of Wichita*, No. 98,335, unpublished Court of Appeals decision filed February 8, 2008.

Claimant filed an Application for Hearing on March 18, 2009, alleging "repetitive use of left upper extremity causing injuries to left upper extremity, neck and shoulder, then while lifting boxes on 12-11-08 aggravated left upper extremity."[17] This claim was assigned Docket No. 1,044,809.

There is no question but that claimant provided timely notice for the December 11, 2008, accident. An accident report was completed, and respondent provided authorized medical treatment with Dr. Cochran for her left wrist. She was given a splint to wear and work restrictions.

In addition, claimant's supervisors, Mr. Good and Mr. Clymer, were also aware the claimant's regular job duties were causing her wrist and arm pain. Given the nature of claimant's work and her ongoing descriptions of pain complaints, respondent was or should have been alerted to the fact that claimant's job was causing injury and was aggravating her prior injuries. Respondent had notice of claimant suffering a series of accidents and repetitive use injuries to her left upper extremity.

ORDER

WHEREFORE, this Board Member affirms Administrative Law Judge Thomas Klein's June 22, 2009, order that respondent provide claimant with medical treatment for the injuries to her left upper extremity.

IT IS SO ORDERED.

Dated this _____ day of August, 2009.

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HONORABLE DUNCAN A. WHITTIER
BOARD MEMBER

c: Kala Spigarelli, Attorney for Claimant
Kendall R. Cunningham, Attorney for Respondent and its Insurance Carrier
Thomas Klein, Administrative Law Judge

[17] Form K-WC E-1, Application for Hearing filed March 18, 2009.